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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GREGORY LEWIS COGHILL,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Petition for a Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the use of two-way closed circuit television pursuant to Va. Code Ann. § 18.2-67.9 violated the defendant's Sixth Amendment right to confront his accusers?

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PETITION FOR WRIT OF CERTIORARI

Gregory Lewis Coghill ("Coghill") petitions the Court for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case. The Supreme Court of Virginia, affirmed, without opinion, the Court of Appeals of Virginia's denial of Coghill's petition for appeal. One of the issues presented in Coghill's petition for appeal was whether Va. Code Ann. §18.2-67.9 (Michies Repl. Vol. 1996) violated Coghill's Sixth Amendment right to confront his accusers. This statute provides for the giving of testimony by child victims of sexual abuse via two-way closed circuit television.

PRIOR OPINIONS

Coghill petitioned the Court of Appeals of Virginia for an appeal of his convictions and sentences. A single judge of the Court of Appeals of Virginia acting pursuant to Va. Code Ann. §17-116.05:2 (Michies Repl. Vol. 1996) and Rules 5A:12 and 5A:15 of the Rules of the Supreme Court of Virginia, denied Coghill's petition by memorandum opinion dated September 30, 1997. Coghill then requested oral argument before a three-judge panel of the Court of Appeals of Virginia. The request was granted. Oral argument was presented on December 2, 1997. The Court of Appeals of Virginia denied Coghill's petition for appeal on December 8, 1997. *See Coghill v. Commonwealth of Virginia,* No. 0399-97-2 (Ct. App. Va. filed June 30, 1997) (*reprinted* at Apps. A and B respectively).

Coghill petitioned to the Supreme Court of Virginia for a review of the decision of the Court of Appeals of Virginia. Oral argument was presented on the petition before a three-judge panel of the Supreme Court of Virginia on April 1, 1998. The petition for appeal was denied on April 8, 1998 without

opinion. Rehearing was requested and denied on June 5, 1998. On July 14, 1998, the Supreme Court of Virginia issued an order deferring the issuance of the mandate in the case. *See Coghill v. Commonwealth of Virginia,* No. 980023 (Va. filed January 7, 1998) (*reprinted* at Apps. C, D, and E respectively).

JURISDICTIONAL STATEMENT

The Supreme Court of Virginia entered judgment on April 8, 1998. Petition for rehearing was denied on June 5, 1998, which is within the 90-day period for filing this petition pursuant to Sup.Ct. R. 13.3. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257 (1988).

STATUTE INVOLVED

The relevant portion of Va. Code Ann. § 18.2-67.9 (Michies Repl. Vol. 1996), specifically paragraph B, provides:

> The court may order that the testimony of the child be taken by closed-circuit television as provided in subsection A if it finds that the child is unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public for any of the following reasons:
>
> 1. The child's persistent refusal to testify despite judicial requests to do so;
> 2. The child's substantial inability to communicate about the offense; or
> 3. The substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying.

> Any ruling on the child's unavailability under this subsection shall be supported by the court with findings on the record or with written findings in a court not of record.

The entirety of Va. Code Ann. §18.2-67.9 (Michies Repl. Vol. 1996) is *reprinted* at App. G.

STATEMENT OF THE CASE

Proceedings Below

On June 12, 1996, Coghill was convicted in a bench trial by the Honorable William R. Shelton of the Circuit Court of Chesterfield of two counts of forcible sodomy on Cory Nelson (age six years) and John A. Guth (age six years) in violation of Va. Code Ann. § 18.2-67.1(A) (1). He was also convicted of one count of aggravated sexual battery on Christen Nelson (age eight years) in violation of Va. Code Ann. §18.2-67.1 (A) (1). Coghill pleaded not guilty and maintained his innocence. On February 6, 1997, Coghill was sentenced to twenty years with eighteen years suspended on one of the forcible sodomy convictions, twenty years with eighteen years and three months suspended on the other forcible sodomy conviction, and twenty years with eighteen years suspended on the aggravated sexual battery conviction.

Prior to trial, the Commonwealth moved the trial court to allow the testimony of the three children to be given by two-way closed circuit television pursuant to Va. Code Ann. § 18.2-67.9. Coghill objected on the basis that allowing testimony to be given in this manner would violate his Sixth Amendment right to confront his accusers. (Hearing Tr. of April 29, 1996 at 19-23, *reprinted* at App. I; Hearing Tr. of May 28, 1996 at 21,

reprinted at App. J). After hearing evidence and argument, the trial court granted the Commonwealth's motion by order of June 11, 1996. (Cir. Ct. Rec. at 154, *reprinted* at App. F). The trial court's order did not state the basis for granting the motion; however, from the Commonwealth's argument at the April 29, 1996 hearing, the trial court's endorsement of Va. Code Ann. §18.2-67.9, undoubtedly was based on *Maryland v. Craig*, 497 U.S. 836 (1990). The Commonwealth argued that *Maryland v. Craig*, ratifies the use of Va. Code Ann. §18.2-67.9. (Hearing Tr. of April 29, 1996 at 21-22 *reprinted* at App. I).

The Court of Appeals of Virginia also relied on *Maryland v. Craig*, for its support of the use of the two-way close circuit television in Coghill's case. The Court of Appeals said:

> The Confrontation Clause of the Sixth Amendment does not guarantee a criminal defendant an absolute right to a face-to-face meeting with the witnesses against him at trial. *See Maryland v. Craig*, 497 U.S. 836, 844 (1990).
>
> [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

(*reprinted* at App. A).

The Supreme Court of Virginia denied Coghill's petition for appeal and rehearing. The court did not give a written opinion; however, there can be no doubt that the Supreme Court of Virginia also relied on *Maryland v. Craig*.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE USE OF TWO-WAY CLOSED CIRCUIT TELEVISION PURSUANT TO VA. CODE ANN. § 18.2-67.9 VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS.

I. The Lower Court's Reliance on *Maryland v. Craig*, is misplaced because the Virginia statute, unlike the Maryland statute, does not provide the requirement of a determination of serious emotional distress such that the child cannot reasonably communicate which this Court has found necessay to meet constitutional safeguards:

In *Maryland v. Craig*, this Court reviewed Maryland's statutory procedure permitting the testimony of an alleged child abuse victim to be given via one-way closed circuit television. The Court upheld the Maryland statute finding the statute satisfied constitutional standards, because it required a determination that the child witness would suffer "serious emotional distress such that the child [could] not reasonably communicate". *Id.* At 856 [upholding Md. Code Ann., Cts. & Jud. Proc. § 9-102(a) (1989), (*reprinted* at App. H)]. The Court did not decide the minimum showing of emotional distress required for the use of the closed circuit television procedure. *Id.*

Va. Code Ann. §18.2-67.9 (Michies Repl. Vol. 1996) does not require a determination that the child victim be unable to communicate in conjunction with the substantial likelihood that the child would suffer severe emotional trauma from

testifying. The Virginia statute does not provide the additional requirement found to be necessary by this Court when it decided that the Maryland statute met constitutional safeguards. Therefore, the lower courts' reliance on *Maryland v. Craig*, for their approval of the procedure as provided in Va. Code Ann. §18.2 - 67.9 (Michies Repl. Vol. 1996) is misplaced. This Court has not yet determined the minimum showing required to constitute "the substantial likelihood, based upon expert testimony, that the child will suffer severe emotional trauma from so testifying". Va. Code Ann. § 18.2-67.9 (B) (3) (Michies Repl. Vol. 1996). Coghill urges the Court to grant his petition for a writ of certiorari to establish the minimum showing of emotional trauma required of the prosecution to implement special procedures such as the use of closed circuit television which deprives individuals charged with child sexual abuse offenses of an in court confrontation with their accusers.

II. Even if *Maryland v. Craig* is Controlling the Use of Two-Way Closed Circuit Television for the Minor Children to Testify Against the Defendant, Deprived Him of His Sixth Amendment Right to Confront His Accusers.

The Confrontation Clause of the Sixth Amendment made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI; *see also* U.S. Const. Amend. XIV.

In *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988), this Court held that "the Confrontation Clause guarantees the defendant a face-to-face meeting with the witnesses appearing before the trier of fact." *Id.* Coy leaves open the question of whether any

exceptions exist to the Confrontation Clause guarantee. "Whatever [the exceptions] may be, they would surely be allowed only when necessary, to further an important public policy". *Id.* at 1021.

In *Maryland v. Craig*, the Court recognized such an exception. The Court determined that Maryland's interest in protecting child victims from the trauma of testifying in a child abuse case to be sufficiently important to justify the use of a special one-way closed circuit television procedure. *See Id.* at 852-53. Significant to the Court was the fact that Maryland's procedure preserved all of the safeguards embodied in the Confrontation Clause.

> The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation -- oath, cross-examination, and observation of the witness' demeanor -- adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. *Id.* at 851.

Coghill's case is different from *Maryland v. Craig*, in several respects. First, Va. Code Ann. § 18.2-67.9 (Michies Repl. Vol. 1996) does not require a determination by the trial court "that the testimony by the child victim in the courtroom will result in serous emotional distress such that the child cannot reasonably communicate". *Compare* Md. Code Ann.,

Cts. & Jud. Proc. § 9-102 (a) (1) (ii) (1989) *with* Va. Code Ann. § 18.2-67.9 (Michies Repl.. Vol. 1996). Here, none of the children ever refused to testify when asked to do so by the judge. None of the children ever exhibited a substantial inability to communicate about the offense.

The Commonwealth's mental health expert, Dr. William M. Lordi, hired privately by the children's parents, never testified that the children would be severely traumatized to the point that they could not communicate about the offense. Although Dr. Lordi did conclude that the children would be severely traumatized or distressed from testifying, his testimony proved no more than the children were nervous and reluctant to testify. He testified as follows:

> I do not feel this child can go face-to-face with the person that's charged with molesting her. It's too terrifying. She does currently have post-traumatic stress syndrome as a result of those behaviors, and the thing I'm concerned about is the continued pounding interviews upon interviews by a variety of people. It's fixing it in a point of time, and I think it's so important, one, that she be spared a face-to-face; two, that with reasonable dispatch that the matter be handled.
>
> He's sort of pulling more and more into himself, but no brain damage, not mentally ill, but at this point, outside of the chronic anxiety, I feel he's otherwise alright, but he's anxious, he doesn't like to go through the drill type of the game.
>
> I do not feel, number one, it would be good for him. I think it would just overwhelm him, and I don't think he could really perform activity well. There's a lot of fear, a lot of fear in each of these kids about this process.

They don't understand what court process is, of course, at their age. (Hearing Tr. of April 29, 1996 at 6-9, *reprinted* at App. K).

In *Maryland v. Craig*, the Court ruled that the trial court must hear evidence and make findings on a case-by-case basis that the child witness would be traumatized by the defendant specifically, not by the courtroom generally. The Court stated that "the emotional distress suffered by the child witness in the presence of the defendant is *more than de minimis*, i.e., more than 'mere nervousness or some reluctance to testify'". *Id.* at 856 (quoting *Wildermuth v. State*, 310 Md. 496, 526, 530 A.2d 275, 286 (1987). Coghill contends that the Commonwealth, through Dr. Lordi's testimony, proved only that the children were nervous and reluctant about court in general. The Commonwealth's burden of proving that the children would suffer severe emotional trauma if they were to testify in front of the defendant was not met.

Secondly, Coghill's case is distinct from *Maryland v. Craig*, because the children here were not sworn under oath before testifying. They were voir dired by the trial court as to their competency to testify, but they were never administered the oath. (Trial Tr. of June 12, 1996 at 69-72, 106-108, and 129-130, *reprinted* at App. L). In *Maryland v. Craig*, the Court approved Maryland's procedure for closed-circuit presentation of evidence because all the elements of confrontation, i.e., oath, cross-examination, and observation of the witness' demeanor, were present. *See Id.* at 851. These elements of confrontation adequately ensured that the testimony was both reliable and subject to rigorous adversarial testing. *See Id.* at 851. "The child witness must be competent and *must testify under oath.*". *Id.* (Emphasis added.) Here, the oath requirement was not present; therefore, the reliability of the testimony was diminished, and the guarantees afforded to the defendant by the

Sixth Amendment were further eroded.

Lastly, like the Maryland statute, Va. Code Ann. § 18.2-67.9 (Michies Repl. Vol. 1996) allows only child *victims* to testify via two-way closed circuit television as to the acts committed upon them. (Emphasis added). Neither statute provide for *witnesses* to such acts to testify in the same manner. (Emphasis added.) *Maryland v. Craig*, did not address the distinction between victims and witnesses, because the child witness there was the victim. Here, the children were also witnesses for one another against Coghill. The Commonwealth requested that all of Coghill's offenses be tried together. Coghill had requested separate trials for each of the offenses against him. The Commonwealth had planned to use the children as witnesses for one another. (Hearing Tr. of March 26, 1996 at 8, 9, and 10, *reprinted* at App. M). Because of the joinder of Coghill's cases, the Commonwealth was allowed to use each of the children as a witness for one another against Coghill via closed circuit television even though the acts testified to by the child witness were not acts committed upon that child witness by Coghill. Coghill objected to the use of closed-circuit television in this respect. (Hearing Tr. of May 28, 1996 at 21 and 22, *reprinted* at App. J).

CONCLUSION

This Petition for Writ of Certiorari provides the Court the opportunity to determine the minimum showing of emotional trauma required for the use of closed-circuit television to present testimony of child abuse victims. Further, the petition should be granted because Coghill is aggrieved by his convictions and sentences obtained in violation of the Sixth Amendment through the state sanctioned use of a statute which does not embody the Sixth Amendment elements of a defendant's right to confront his accusers. For these reasons, Coghill contends that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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August 31, 1998

APPENDIX A

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday the 30th day of September, 1997.

Gregory Lewis Coghill, Appellant,

against Record No. 0399-97-2
Circuit Court Nos. CR96FOO323-01,
CR96FOO324-01 and CR96FOO355-01

Commonwealth of Virginia, Appellee.

From the Circuit Court of Chesterfield County
Before Chief Judge Moon

This petition for appeal has been reviewed pursuant to Code § 17-116.05:2 (C) and is denied for the following reasons:

I. The Confrontation Clause of the Sixth Amendment does not guarantee a criminal defendant an absolute right to a face-to-face meeting with the witnesses against him at trial. See Maryland v. Craig, 497 U.S. 836, 844 (1990).

> [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that--permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Id. at 855. The trial court must find that the child would be traumatized by the presence of the defendant, not the courtroom generally, and the court must find that the trauma would be more than de minimus. See id. at 856. The finding of necessity must be a case specific one. See id. at 855.

Code § 18.2-67.9 provides, in pertinent part, that a trial court, in a criminal proceeding involving a sexual offense against a child twelve years of age or younger, may order that the child's testimony be taken in a room outside the courtroom and televised via two-way closed circuit television into the courtroom. The statute authorizes the court to order such a procedure if the court finds that the child is unavailable to testify in open court because there is a "substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying."

Appellant stipulated at the April 29, 1996 hearing that Dr. William Michael Lordi was an expert in the field of psychiatry. Dr. Lordi testified regarding each victim separately. Dr. Lordi was treating all three children. He testified that there was "no question" that victim 1, whom Dr. Lordi diagnosed as suffering from post-traumatic stress syndrome, would suffer severe emotional trauma if she testified in appellant's presence in court. Dr. Lordi testified that victim 2, whom Dr. Lordi diagnosed as suffering chronic anxiety, would suffer severe emotional distress if he were required to testify in appellant's presence. Finally, Dr. Lordi testified that victim 3, whom Dr. Lordi testified had suffered intellectual impairment secondary to anxiety, would suffer severe emotional distress if he were required to testify in appellant's presence.

The Commonwealth presented expert testimony as required by the statute. The evidence established that there was a substantial likelihood that all three child witnesses would suffer severe emotional distress if required to testify in

appellant's presence.

The court did not err in permitting use of the two-way closed circuit television procedure.

II. "'A trial court has limited discretion to order an accused to be tried for more than one offense at the same time.'" Kirk v. Commonwealth, 21 Va. App. 291, 295, 464 S.E.2d 162, 164 (1995) (citation omitted). Rule 3A:10(c) provides that the court may direct that a defendant be tried for all offenses pending against him in a single trial, if justice does not require separate trials and the offenses meet the requirements of Rule 3A:6(b) or the parties consent to the joinder. Rule 3A:6(b) addresses offenses which are "based on the same act or transaction, or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan."

The evidence at trial established that the acts of molestation against victim 1, victim 2, and victim 3 occurred in the presence of each other in an abandoned house behind victim 3's home. According to the children's testimony, appellant, wearing a religious robe, with nothing underneath it, took the three children on walks to the abandoned house where the acts against all three children took place. Appellant committed some separate acts against victim 3 in victim 3's home, where appellant resided during the relevant time period.

Appellant's acts of sodomy and aggravated sexual battery against the three children were connected and constituted parts of a common scheme or plan.

Justice did not require separate trials for the sexual offenses against the three children.

Generally, evidence that the accused committed other crimes is inadmissible to prove guilt of the crime for

> which the accused is on trial, even though the other crimes are of the same nature as the one charged in the indictment. But the exceptions to the general rule are as well established as the rule itself . . . .
> [R]ecognized exceptions to the general rule permit introduction of evidence of other offenses when "the evidence is connected with or leads up to the offenses for which the accused is on trial" or when "the other crimes constitute a part of a general scheme of which the crime charged is a part."

Rodriguez v. Commonwealth, 249 Va. 203, 206, 454 S.E.2d 725, 727 (1995) (citation omitted).

"'[I]f such evidence tends to prove any of the relevant facts of the offense charged and is otherwise admissible, it will not be excluded merely because it shows him to be guilty of another crime.'" Reynolds v. Commonwealth, 24 Va. App. 220, 224, 481 S.E.2d 479, 481 (1997) (citation omitted). The trial judge must determine whether the probative value of the other crimes evidence outweighs its incidental prejudicial effect. See id.

In this case, the evidence of the acts committed on each child would have been admissible in trials for all the offenses. Thus, justice did not require separate trials. See Satcher v. Commonwealth, 244 Va. 220, 230-31, 421 S.E.2d 821, 828 (1992) (in defendant's trial for capital murder, rape, and related crimes, evidence of another assault, robbery, and attempted rape committed by defendant against another victim in same area one hour earlier admissible; court did not abuse discretion in denying Satcher's motion for separate trials).

Under the facts and circumstances of this case, we cannot say that the trial court abused its discretion in ordering

that the charges involving the three victims be tried at the same time.

III. "In order to be considered on appeal, an objection must be timely made and the grounds stated with specificity. Rule 5A:18. To be timely, an objection must be made when the occasion arises -- at the time the evidence is offered or the statement made." Marlowe v. Commonwealth, 2 Va. App. 619, 621, 347 S.E.2d 167, 168 (1986).

At trial, prior to any of the child witnesses testifying, the prosecutor asked the court if it would swear the children over the closed circuit television. The court responded that it was "not a question of swearing them in. It's a question of making a determination that they're competent to testify." Appellant voiced no objection to the court's statement, and did not argue that the child witnesses must be sworn.

As each child witness was called to testify, the court asked him or her a series of questions to ascertain their competency to testify. Appellant voiced no objection to the procedure when the court asked the questions, or when the children testified. He made no objection throughout the trial. Appellant first objected that the child witnesses had not been sworn in his written motion to set aside the verdict. The objection came too late. Appellant waived the objection.

Accordingly, Rule 5A:18 bars our consideration of this issue on appeal. Moreover, the record does not reflect any reason to invoke the good cause or ends of justice exceptions to Rule 5A:18.

IV. Appellant alleges on appeal that he filed a discovery motion pursuant to Rule 3A:11, a motion for exculpatory information, a motion for a bill of particulars, and motions for subpoenas duces tecum for Jolene Evans of the

Department of Social Services (DSS), Detective Humphries of the Chesterfield County Police Department, the Medical College of Virginia, and Dr. Lordi. Appellant claims that "[a]ll of these motions and requests were denied for the most part by the trial court."

The record, however, does not contain orders explicitly ruling on the discovery request, motion for exculpatory evidence, and motion for bill of particulars.[1] The record contains responses from the Commonwealth to the motions. The response to the discovery motion included, as an attachment, the physical examination reports on the three victims. Attached to a letter from the prosecutor dated June 4, 1996, is a summary of a statement by appellant to Evans of DSS and Detective Humphries. In response to appellant's motion for exculpatory evidence, the Commonwealth responded that victim 3, who had consistently stated that he saw appellant sexually abuse victim 2, gave contrary testimony at the preliminary hearing. In response to appellant's motion for a bill of particulars, the Commonwealth provided a time frame of June 17 to August 12, 1995.

The court granted the motion to quash the subpoena duces tecum directed to DSS and Detective Humphries, although the court ruled that any recorded statements of appellant made to either DSS or the detective must be disclosed by the Commonwealth. The court did not err in granting the motion to quash. "[Wlhere an agency is involved in the investigation or prosecution of a particular criminal case, agency employees become agents of the Commonwealth for

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[1] By order entered June 11, 1996, the court took under advisement appellant's request, at the hearing of April 29, 1996, for the Commonwealth to provide a specific date that the offenses were alleged to have occurred.

purposes of Rule 3A:11 and must be considered a party to the action for purposes of Rule 3A:12." Ramirez v. Commonwealth, 20 Va. App. 292, 296-97, 456 S.E.2d 531, 533 (1995). The Commonwealth is charged with knowledge of agency information and must comply with the requirements of Rule 3A:11 and Brady v. Maryland, 373 U.S. 83 (1963). See Ramirez, 20 Va. App. at 297 n.1, 456 S.E.2d at 533 n.1.

The trial judge ruled that he would review Dr. Lordi's records in camera and determine if those records contained any materials to which appellant was entitled. Subsequently, after the judge had reviewed Lordi's records, he granted the Commonwealth's motion to quash the subpoena duces tecum directed to Lordi. The trial judge did not err in such a procedure, nor did the procedure deny appellant meaningful appellate review of the issue.

Appellant did not secure a ruling from the trial court on the subpoena duces tecum directed to MCV Hospital and the motion to quash that subpoena, filed by counsel for the hospital. The request and affidavit in support of the subpoena, and the motion to quash it are contained in the record, but the orders of the court ruling on the other motions to quash does not address the MCV subpoena. Because appellant did not secure a ruling on the MCV subpoena request, there is nothing for this Court to review. See Fisher v. Commonwealth, 16 Va. App. 447, 454, 431 S.E.2d 886, 890 (1993).

V. Finding the evidence irrelevant, the trial court excluded the testimony of Dr. Michael Smith, appellant's psychologist, that appellant did not suffer from psychological or pathological problems, tested within normal limits on psychological tests, did not meet the profile of a pedophile or sexual deviant, and did not have an aggressive or predatory personality. "'Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue.'"

Morris v. Commonwealth, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992)(en banc)(citation omitted). The Commonwealth was required to prove that appellant sodomized and sexually abused victims below the age of thirteen. See Code §§ 18.2-67.1 and 18.2-67.3. It was not necessary for the fact finder to decide whether appellant was a pedophile or suffered from psychological problems. Therefore, Dr. Smith's opinion had no tendency to prove or disprove an issue in the case. The trial court did not err in excluding this evidence.

VI. A contemporaneous, specific objection must be made in the trial court in order for an appellate court to consider the question. See Harward v. Commonwealth, 5 Va. App. 468, 473, 364 S.E.2d 511, 513 (1988)(citing Rule 5A:18). "To be timely, an objection to the admissibility of evidence must be made when the occasion arises -- that is, when the evidence is offered, the statement made or the ruling given." Id. Such an argument is not timely when it is made for the first time in a post-trial motion to set aside the verdict. See Boblett v. Commonwealth, 10 Va. App. 640, 651, 396 S.E.2d 131, 137 (1990).

On appeal, appellant alleges that the court erred in permitting Dr. Miriam Barone to testify that she discovered a "notch" on the hymen of victim 1 during a physical examination of that victim, that the child would not have caused the notch, and that such a notch was the result of trauma, most commonly caused by penetration. On appeal, appellant contends that the evidence was inadmissible because the Commonwealth failed to lay a proper foundation. Victim 1 had not testified that appellant had penetrated her. Thus, he claims, there was no connection between the "notch" and appellant, and no foundation was presented for the introduction of Dr. Barone's testimony.

At trial, however, appellant objected to Dr. Barone's

testimony on the ground that it would "usurp the ultimate fact findings of the Court." Appellant first raised his current argument concerning Dr. Barone's testimony in his post-trial motion to set aside the verdict. The objection came too late. Accordingly, Rule 5A:18 bars our consideration of this claim on appeal. Moreover, the record does not reflect any reason to invoke the good cause or ends of justice exceptions to Rule 5A:18.

VII. "The admissibility of expert witness evidence is within the sound discretion of the trial court, and the decision will not be disturbed on appeal unless the trial court has clearly abused its discretion." Adkins v. Commonwealth, 20 Va. App. 332, 341, 457 S.E.2d 382, 386 (1995). Moreover, "[t]he credibility of witnesses and the weight accorded their testimony are matters solely for the trier of fact." Bell v. Commonwealth, 22 Va. App. 93, 99, 468 S.E.2d 114, 117 (1996).

Here, the trial judge, as fact finder, observed Dr. Lordi's testimony, including appellant's efforts to impeach him, and Dr. Lordi's explanation of inconsistencies. Dr. Lordi's testimony was not incredible as a matter of law, and the trial judge did not err in permitting the testimony.

VIII. "On appeal, we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom." Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987). So viewed, the evidence established that appellant lived in the home of victim 3 during the summer of 1995. Victims 1 and 2, who are sister and brother, played often at the home of victim 3 during that summer. The victims went on walks with appellant on several occasions. Appellant wore a religious robe, with no clothing underneath, and took the children to an abandoned house near victim 3's home.

Victim 1 testified that appellant sometimes removed his robe while they were inside the abandoned house. Appellant pulled down victim 1's underwear and slacks and put his mouth and hands on her "private parts." Victim 1 testified that she also saw appellant pull down the clothing of victims 2 and 3 and put his mouth on their private parts. She also saw appellant put his hands on the private parts of victim 3. Appellant asked the children to touch his private parts, but only victim 3 obliged, using his mouth. Appellant told the children not to tell anyone what happened, and gave the children candy bars.

Victim 2 testified that appellant took him and victim 3, and sometimes victim 1, to the "haunted" house. Victim 2 testified that appellant, sometimes wearing no clothing, touched victim 2's private parts with appellant's hands and mouth. According to victim 2, appellant did the same things to victim 1 and victim 3. Only victim 3 touched appellant.

Victim 3 testified that appellant touched his private parts with appellant's hands and mouth while they were at the "haunted" house and in appellant's bedroom in victim 3's home. According to victim 3, appellant "made" him touch appellant's private parts with his hands and mouth. Victim 3 testified that when he did this, appellant's private parts would "get hard" and when something came out, appellant put it on a rag. Victim 3 testified that he saw appellant touch victim 1's private parts. He testified that he saw appellant touch victim 2's private parts, but not as much as victim 1 and himself. According to victim 3, appellant told the children that if he went to jail, he would break out.

While he denied the offenses, appellant admitted that, wearing only his religious robe and boots, he took the three children on walks to an abandoned house near the home of victim 3.

Although there were some inconsistencies in the details given by the victims, the inconsistencies were "not such as to render the evidence incredible as a matter of law." Crump v. Commonwealth, 20 Va. App. 609, 619, 460 S.E.2d 238, 242 (1995). Moreover, the fact finder believed the testimony of the Commonwealth's witnesses regarding the offenses, and rejected appellant's testimony. "The weight which should be given to evidence and whether the testimony of a witness is credible are questions which the fact finder must decide." Bridgeman v. Commonwealth, 3 Va. App. 523, 528, 351 S.E.2d 598, 601 (1986). The testimony of the Commonwealth's witnesses was competent and was not inherently incredible. The evidence was sufficient to prove beyond a reasonable doubt that appellant committed the charged offenses.

IX. The trial as a whole did not deny appellant due process rights under the state and federal constitutions.

A. Closed circuit television

The trial court's ruling allowing the use of closed circuit television for the child witnesses at trial is addressed above in Issue I. Appellant also alleges on appeal that technical difficulties, which hampered the ability of participants in the trial to hear and which hampered communication between appellant and counsel, denied him a fair trial. Appellant, however, failed to timely make such objection at trial. While it is clear from the record that the trial participants could, at times, not be heard, appellant did not argue that the technical difficulties deprived him of a fair trial. He asked for no ruling from the court during trial on that ground. Moreover, appellant did not note for the record, during trial, that he was denied an ability to communicate with counsel. Appellant raised this argument in his motion to set aside the verdict. That argument, however, came too late. See Marlowe, 2 Va. App. at 621, 347

S.E.2d at 168.

Accordingly, Rule 5A:18 bars our consideration of this argument on appeal. Moreover, the record does not reflect any reason to invoke the good cause or ends of justice exceptions to Rule 5A:18.

B. Joinder

The trial court's ruling permitting joinder of the charges is addressed above in Issue II.

C. Testimony of the Commonwealth's witnesses

The sufficiency of the evidence presented by the Commonwealth is addressed above in Issue VIII. The trial court did not err in permitting leading questions by the prosecutor to the child witnesses. The conduct of trial is a matter for the trial judge's discretion, reversible on appeal only upon a showing of abuse of that discretion. See Griffin v. Commonwealth, 22 Va. App. 622, 625, 472 S.E.2d 285, 287 (1996). We cannot say that the trial judge abused his discretion in permitting leading questions to the young witnesses.

D. Discovery

The trial court's rulings on subpoenas duces tecum are addressed above in Issue IV. Appellant also alleges that the trial court's failure to preserve Dr. Lordi's notes denied him exculpatory evidence.

> A defendant cannot simply allege the presence of favorable material and win reversal of his conviction. Rather, a defendant must prove the favorable character of evidence he claims has been improperly suppressed. Speculative allegations are not adequate.

Hughes v. Commonwealth, 18 Va. App. 510, 526, 446 S.E.2d 451, 461 (1994)(en banc)(citation omitted). Here, appellant has not identified exculpatory evidence within Dr. Lordi's notes that appellant was denied.

E. Exclusion of Dr. Smith's testimony

The trial court's ruling, excluding Dr. Smith's testimony, is addressed above in Issue V.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17-116.05:2(D) and Rule 5A:15(a). If appellant files a demand for consideration by a three-judge panel, the demand may include a statement, not to exceed one typewritten page, identifying how this order is in error.

A Copy,
Teste:
Cynthia L. McCoy, Clerk

By: "s/_____"

Deputy Clerk

APPENDIX B

VIRGINIA:

In the Court of Appeals of Virginia on Monday the 8th day of December, 1997.

Gregory Lewis Coghill, Appellant,

against Record No. 0399-97-2
Circuit Court Nos. CR96FOO323-01, CR96FOO324-01 and CR96FOO355-01

Commonwealth of Virginia, Appellee.

From the Circuit Court of Chesterfield County

Before Judge Benton,
Retired Judges Stewart and Williams*

For the reasons previously stated in the order entered by this Court on September 30, 1997, the petition for appeal in this case hereby is denied.

This order shall be certified to the trial court.

---

*Retired Judges Robert W. Stewart and Benjamin A. Williams, Jr. took part in the consideration of this case by designation pursuant to Code § 17-116.01.

A Copy,
Teste:
Cynthia L. McCoy, Clerk

By: "s/_____"
Deputy Clerk

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 8th day of April, 1998.

Gregory Lewis Coghill, Appellant,

against Record No. 980023
Court of Appeals No. 0399-97-2

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,
Teste:
David B. Beach, Clerk

By: "s/_____"

Clerk

APPENDIX D

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 5th day of June, 1998.

Gregory Lewis Coghill, Appellant,

against Record No. 980023
Court of Appeals No. 0399-97-2

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 8th day of April, 1998 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

"s/_____"

Clerk

APPENDIX E

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 14th day of July, 1998.

Gregory Lewis Coghill, Appellant,

against Record No. 980023
Court of Appeals No. 0399-97-2

Commonwealth of Virginia, Appellee.

ORDER DEFERRING ISSUANCE OF MANDATE

Upon consideration of the motion of the appellant, by counsel, it is ordered that issuance of the mandate in this case be and the same hereby is deferred, to and including the 3rd day of September, 1998, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance of the mandate shall be deferred until the Final determination of the case by that Court.

A Copy,
Teste:

"s/_____"

Clerk

APPENDIX F

Virginia:

In the Circuit Court of the County of Chesterfield

COMMONWEALTH

v. Upon Indictments for Felonies.
- Aggravated Sexual Battery(File #CR96FOO323)
- Forcible Sodomy (File #CR96FOO324)
- Forcible Sodomy (File #CR96FOO355)

Offense Date: On or about 6/17/95 through 8/27/95

GREGORY LEWIS COGHILL, DOB: 11/12/53
SSN: 225-84-3132

On May 28, 1996, appeared the defendant, Gregory Lewis Coghill, and his attorneys Michael HuYoung and Jennifer E. Crossland. The Commonwealth was represented by Virginia S. Duvall, Assistant Commonwealth's Attorney and Michael S. J. Chernau, Assistant County Attorney.

The assistant county attorney moved the Court to quash the subpoena duces tecum served upon the Chesterfield County Police Department and the Chesterfield-Colonial Heights Department of Social Services, which motion the Court granted with exception of any recorded statements made to the Chesterfield County Police Department and the Chesterfield-Colonial Heights Department of Social Services.

The assistant commonwealth's attorney moved the Court to quash the subpoena duces tecum served upon Dr. William M. Lordi which the Court ruled that it was not convinced that the defendant's attorney is entitled to the statements made by the parents and advised that it will review

the records of Dr. Lordi and advise counsel of its decision.

The Court made the following rulings on motions that were previously taken under advisement on April 29, 1996:

That the Commonwealth's motion to order that the testimony of the children be taken by closed-circuit television be granted, as it is appropriate, the Court finding that the witness would suffer severe emotional trauma if required to testify before the defendant.

That the Commonwealth's motion for consolidation be granted, as it is appropriate, the Court finding it would cause severe emotional trauma to require the victims to testify on three different trials.

The Court continues these cases until June 12, 1996 at 9:00 a.m., for trial by jury.

The defendant is allowed to depart pending his next appearance in this court.

These cases were reported by Debra Johnson of Capital Reporting, Inc., Court Reporters.

Enter: 6/11/96

"s/ "
William R. Shelton, Judge

JUN 11 1996

APPENDIX G

Chap. 4 Crimes Against the Person

§ 18.2-67.9. Testimony by child victims using two-way closed-circuit television. --

A. In any criminal proceeding, including preliminary hearings, involving an alleged offense against a child the age of twelve or under relating to a violation of the laws pertaining to kidnapping (§ 18.2-47 et seq.), criminal sexual assault (§ 18.2-61 et seq.) or family offenses pursuant to Article 4 (§ 18.2-362 et seq.) of Chapter 8 of Title 18.2, the Commonwealth's attorney or the defendant may apply for an order from the court that the child's testimony be taken in a room outside the courtroom and be televised by two-way closed-circuit television. The party seeking such order shall apply for the order at least seven days before the trial date or at least seven days before such other preliminary proceeding to which the order is to apply.

B. The court may order that the testimony of the child be taken by closed-circuit television as provided in subsection A if it finds that the child is unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public, for any of the following reasons:

1. The child's persistent refusal to testify despite judicial requests to do so;

2. The child's substantial inability to communicate about the offense; or

3. The substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying.

Any ruling on the child's unavailability under this subsection shall be supported by the court with findings on the record or with written findings in a court not of record.

C. In any proceeding in which closed-circuit television is used to receive testimony, the Commonwealth's attorney and the defendant's attorney shall be present in the room with the child, and the child shall be subject to direct and cross-examination. The only other persons allowed to be present in the room with the child during his testimony shall be those persons necessary to operate the closed-circuit equipment, and any other person whose presence is determined by the court to be necessary to the welfare and well-being of the child.

D. The child's testimony shall be transmitted by closed-circuit television into the courtroom for the defendant, jury, judge and public to view. The defendant shall be provided with a means of private, contemporaneous communication with his attorney during the testimony.

E. Notwithstanding any other provision of law, none of the cost of the two-way closed-circuit television shall be assessed against the defendant. (1988, c. 846.)

APPENDIX H

Maryland Cts. & Jud.Proc.Code Ann. § 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989).

(a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article of Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

(i) The testimony is taken during the proceeding; and

(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:

(i) The prosecuting attorney;

(ii) The attorney for the defendant;

(iii) The operators of the closed circuit television equipment; and

(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is

testifying by any appropriate electronic method.

(c) The provisions of this section do not apply if the defendant is an attorney pro se.

(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

APPENDIX I

MR. BARNES: If it please the Court, regarding the motion on the closed-circuit TV, I'll speak to that first. 18.2-67.9 deals with this particular issue. There are three things the Court needs to find.

One, that they'll persistently refuse to testify despite judicial requests.

I don't believe that this has any application here, since that's not occurred and there's no indication they refused to testify.

The child's substantial inability to communicate about the offense, which also does not apply. And I do not believe that's before the Court, because they do communicate, and I believe the evidence is going to show that the first communication was allegedly to one of the mothers of the child, and that from that particular point both mothers and all the children went to see Dr. Lordi about a month later -- or a few weeks later. And according to Dr.

Lordi, they are communicating about the offense.

Thirdly, is the substantial likelihood, based on expert opinion testimony, that the child would suffer severe emotional trauma from so testifying.

And we've heard evidence, too, that it will be anxiety producing, but I have not heard any expert testimony, other than conclusory, as to what effect it will have. Everyone is anxious about testifying in court, and I think the Court can probably take note that everyone is reluctant to testify, adults who are less experienced at it.

But the statute, which in essence flies in the face of the confrontation clause of the constitution, that is, that the defendant has the right to confront his accuser, is not diminished by the fact that the witness or the accuser, alleged accuser, may feel anxiety.

These children are not on medication. They've only been seeing the doctor once a month. There is apparently no coordination between the doctor

and any counselor at school. Neither of the parents has testified to this matter.

And I do not believe that the Commonwealth has overcome 18.2-67.9 to the point that it would

overcome the very foundational concept that the defendant has the right to confront the accuser, especially in light of some of the testimony we heard today; conclusion that a rape had occurred, and conclusion that a hand was inserted, and then the conclusion that maybe it wasn't a rape, and maybe it wasn't a hand, maybe it was a finger.

So the question of credibility in this cases, the question of the motivation of the children to testify or to make an allegation against the defendant, whom the Court will find was a resident of the household of these parties for many, many, many, many, many months, coupled with the fact that we have the additional problem that the Commonwealth has not told us the date that any of this occurred, I would suggest that they have not overcome the burden, that would essentially emasculate the confrontation clause.

MS. DUVAL: Your Honor, the statute says, the substantial likelihood, based on expert opinion testimony, that the child would suffer severe emotional trauma from so testifying.

As far as the confrontation clause of the Sixth Amendment, that has been ruled on with Maryland versus Craig -- I have a copy for the Court -- in which they say very clearly, Judge, that this does not

fly in the face of the confrontation clause. They talk about where the testimony reliability is otherwise assured. And that's assured by individual findings, which we're having here today, and the fact that the Court still rules on competency to testify, testify under oath, right of cross-examination, and the jury able to view the witnesses' demeanor.

MR. BARNES: Just to point out, I have that case also, Your Honor, and ask the Court to look at 3161: The trial judge must first, quote, determine the testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

And I believe the statutes that look to Maryland versus Craig for their constitutionality here are looking at the interest of the Commonwealth in being able to produce evidence. This is not a situation where we're trying to just reduce the anxiety to the witness. If the production of trauma rises to a level that the Commonwealth is denied its

witness, then the statute would be, constitutionally would be sanctioned by the supreme court as it's stated in Marilyn versus Craig. In the footnote it says: The judge determines the testimony by the child

victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate. This is not a balancing test where the Sixth Amendment goes away if the witness feels distressed. These statutes and this case deal with the right of the Commonwealth to produce evidence, so that they're not deprived of a witness where the witness cannot communicate because of some reason when they get on the stand.

There's no evidence about that here. I do not believe that this statute applies. And if it does apply, then in this case, circumstance, then our position would be that it flies in the face of the confrontation clause as determined by Maryland versus Craig.

THE COURT: Well, I'm not that familiar with Maryland versus Craig. I am familiar with the statute. My first impression is that the Commonwealth has borne the burden of establishing that severe emotional trauma would be created by having the child testify in front of the defendant. But I'll read

Maryland versus Craig before I give you my opinion.

MR. HUYOUNG: Yes, Your Honor. Again, note our objection on the closed circuit television. I'm sure the Court has read the Maryland versus Craig case.

THE COURT: I read all of the authority that you cited to me. Based on Dr. Lordi's testimony, I am convinced it is appropriate in this case to have them testify under the closed circuit TV.

MR. HUYOUNG: Judge, again, just for the record, this was argued last time, and I just want to make it clear on the record that it's also the defendant's position that the statute, as it is being applied at this time because of that Subsection 3, substantial likelihood based on the expert opinion testimony, it's vague, and we would say that it would be unconstitutional as is applicable in this case. The Court has made the ruling. We would just note that for the record.

In regards to the joinder, Your Honor, the Commonwealth filed a motion in regards to

having the cases joined. It's interesting to point out, in this motion it refers to the fact that of course the closed circuit TV is only for the victim. It's not for witnesses. In a situation where, such as this case, where you have, according to the Commonwealth, the reason why they want to consolidate all these trials is because you've got these children witnesses testifying that these acts occurred to the victim. So let's say you're trying Christen, you've got John and Cory testifying on behalf of the Commonwealth for Christen and then same as it goes down the road. The closed circuit television statute only applies for victims and not witnesses. Therefore, if you join all these cases together, the defendant is terribly denied his right to confrontation because you have witnesses now that are shielded from coming to court and testifying in a face-to-face confrontational type of setting. That's what the confrontational clause is all about. You are to face your accusers. You are to have witnesses that are going to testify against you be present.

APPENDIX K

THE COURT: Will you stipulate, Mr. Barnes?
MR. BARNES: Dr. Lordi is well-known to this Court. We talked last night --
THE COURT: His credentials, it's not necessary, I know him well.
MR. BARNES: We spoke yesterday on the phone. We stipulated at that time.
BY MS. DUVAL:
Q: Dr. Lordi, in your capacity as a psychiatrist, have you had occasion to give therapy to Christen Nelson?
A: Yes, ma'am, I have.
Q: And she is a child of what age?
A: She's currently nine years old, plus a few weeks.
Q: And when did you first begin your therapy with Christen Nelson?
A: Excuse me a second. I first did the intial psychiatric work-up in September 18th, '95, and have seen her subsequently on a once-a-month basis and had batteries of

psychological tests done on the child and have appeared previously in court.

Q: And what was the purpose for seeing Christen Nelson?

A: She was initially referred to me because of

being raped and sexually molested, and I performed an evaluation and had the testing done, interviewed the child alone, and interviewed the child with the mother, and had the test and integrated that, and continued to see her.

Q: Okay. Dr. Lordi, we're here this morning because the statute requires that an expert give an opinion as to whether this child can testify face-to-face with the defendant, and as to whether that would cause severe emotional trauma. In your opinion, sir-what is your opinion?

A: I do not feel this child can go face-to-face with the person that's charged with molesting her. It's too terrifying. She does currently have post-traumatic stress syndrome as a result of those behaviors, and the thing I'm concerned about is the continued pounding interviews upon

interviews by a variety of people. It's fixing it in a point of time, and I think it's so important, one, she be spared a face-to-face; two, that with reasonable dispatch that the matter be handled.

Q: Do you feel that this would cause her severe emotional trauma then if she had to testify before the defendant?

A: Yes, no question.

Cory Nelson, you've had the occasion over the past year to give therapy to Cory Nelson. How old is Cory?

A: Seven years, three plus months. And he was

initially seen 9-26, I believe-9-18-95 was initially referred to me because he had been sexually molested. He emerged as a kid of good average intelligence, very anxious. He had a chronic anxiety state at that time. He's lost headway in terms of being able to perform intellectually in school. There is some improvement in the past month or two. Basically he's of average intelligence, no brain damage and no mental illness. He has extensive anxiety. And I think he needs constant monitoring. He's showing - this is reflecting itself in his ability to learn. He's sort of pulling more and more into himself, but no brain damage, not mentally ill, but at this point, outside of the chronic anxiety, I feel he's otherwise all right, but he's anxious, he doesn't like to go through the drill type of the game.

Q: And what would be your opinion, sir, as far as his having to testify in front of the defendant face-to-face?

A: I do not feel he can handle it. I think it would be overwhelming to him, and I think once again it just serves the purpose of driving this thing deeper into the child. And I think once again I would urge, respectfully, that reasonable dispatch be exercised, one,in not seeing the person he's accused face-to-face, and on the other hand, that he not be put through many more of these trying incidents.

Q: Then your opinion would be that it would

cause him severe emotional distress?
A: Yes, ma'am, it is.
Q: John Guth, when did you first -- well, how old is John Guth?
A: John is seven years and six months.
Q: And when did you first begin to see him?
A: I saw him on the 18th of September for the first time, for psychiatric evaluation, and have seen him subsequently individually, and also have batteries of psychological tests conducted on him.
Q: Why did you see him, and how did you find him?
A: He was initially referred to me because he was sexually molested over a period of time, estimated to be a year and a half, and he's been very anxious, anxious as a result of that. He's a very bright little fellow,functioning

17 in the superior range. The moderate intellectual impairment is
18 secondary to the anxieties that he feels. No evidence of brain
19 damages. No evidence of mental illness as such. There's a
20 great readiness from anxiety. There's a fear of some impending
21 doom happening. He's getting a little more comfortable, and
22 he's been improving in his school performance the last time
23 I saw him. I did not feel this child or any of the children
24 needed medication at the time, but they're being monitored for
25 the effect it's having on their learning capacity and their

adaptive capacity.

Q: And as far as John Guth is concerned, do you believe that he should testify face-to-face?

A: I do not feel, number one, it would be good for him. I think it would just overwhelm him, and I don't think he could really perform activity well. There's a lot of fear, a lot of fear in each of these kids about this process. They don't understand what court process is, of course, at their age.

Q: Is it your opinion that there would be severe emotional distress as far as the concern is if he testified face-to-face with the defendant?

A: Yes, ma'am, I do feel so.

Q: You're still seeing these children?

A: Yes, ma'am. Seeing them again tomorrow, as a matter of fact.

MS. DUVAL: That's all the questions I have.

(By closed-circuit-Circuit Television:)

MS. GILL: Shall we proceed, your Honor?

THE COURT: I want to ask the young lady some questions, if you will tell me what her name is.

CHRISTEN NELSON, a child called by the Commonwealth, testifies as follows:

MS. GILL: Her name is Christen Nelson.

THE COURT: Christen, good

morning
MS. GILL: It's Christen.
THE COURT: Good morning.
THE WITNESS: Good morning.
THE COURT: Can you hear me okay? Can you hear me okay?
MS. GILL: Try again, your Honor.
THE COURT: Christen?
THE WITNESS: Yes.
THE COURT: Are you hearing me now?
THE WITNESS: Yes.
THE COURT: Can you tell me your full name, Christen?
THE WITNESS: Christen Nelson.
THE COURT: And can you tell me how old you are, Christen?
THE WITNESS: Nine.
THE COURT: And can you tell me if you go to school?
THE WITNESS: Three Chopt.

THE COURT: What grade are you in?

THE WITNESS: Third.

THE COURT: What's your teacher's name?
THE WITNESS: Miss Kaufman.
THE COURT: Do you know what county you live in?
THE WITNESS: Henrico.
THE COURT: Do you know what state you live in?
THE WITNESS: Virginia.
THE COURT: Do you know your birthday?
THE WITNESS: April lst.
THE COURT: Do you know what year you were born?
THE WITNESS: 1987.
THE COURT: Christen, do you know the difference between telling the truth and telling a lie?
THE WITNESS: Yes.
THE COURT: What are you supposed to do?

THE WITNESS: Tell the truth.

THE COURT: What happens if you don't tell the truth?

THE WITNESS: I get punished.

THE COURT: Are you going to tell the truth this morning to the questions that are propounded to you?

THE WITNESS: Yes.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MS. GILL:

THE COURT: Who is going to be your next witness?

MS. GILL: Next witness would be Cory Nelson.

C0RY NELSON, a child called by the Commonwealth, testifies as follows:

MS. GILL: Cory, this is Mr. Barnes. He will be asking you some questions too, okay?

THE WITNESS: All right.

MS. GILL: What we need to do is speak up. The judge is going to ask you some questions, okay?

THE COURT: Good morning, Cory.

THE WITNESS: Good morning.

THE COURT: Can you hear me okay?

THE WITNESS: Yeah.

THE COURT: Cory, you want to tell me your name?

THE WITNESS: What?
THE COURT: You want to tell me your full name?
THE WITNESS: Cory Ian Nelson.
THE COURT: How old are you, Cory?
THE WITNESS: Seven.
THE COURT: And do you go to school?
THE WITNESS: What?
THE COURT: Do you go to school?
THE WITNESS: Fine.
THE COURT: Do you go to school?
THE WITNESS: One.
THE COURT: What's the name of the school you go to?
THE WITNESS: The Three Chopt Hill Elementary.
THE COURT: Do you know what

county that is located in?

THE WITNESS: No.

THE COURT: Do you know your birthday?

THE WITNESS: January 6th.
THE COURT: Do you know
your teacher's name?
THE WITNESS: Miss Craig.
THE COURT: Do you know the
difference in telling the truth and
telling a lie?
THE WITNESS: Yes.
THE COURT: And which are you
supposed to do?
THE WITNESS: Truth.
THE COURT: And what happens if
you don't tell the truth?
THE WITNESS: I get in trouble.
THE COURT: What are you
supposed to do this morning?
THE WITNESS: What?
THE COURT: And what are you
going to do this morning, tell the truth?
THE WITNESS: Yes.
THE COURT: You may proceed.

22

23 DIRECT EXAMINATION

24 BY MS. GILL:

MS. GILL: Next witness would be Little John Guth.

J 0 H N G U T H, a child called by the Commonwealth, testifies as follows:

THE COURT: Good morning, John.

THE WITNESS: Good morning.

THE COURT: Could you tell me your full name?

THE WITNESS: John Guth.

THE COURT: Can you tell me how old you are, John?

THE WITNESS: Seven.

THE COURT: Do you go to school?

THE WITNESS: Yes.

THE COURT: Do you know the name of the school you go to?

THE WITNESS: The Three Chopt.

THE COURT: And do you know your teacher's name?

THE WITNESS: Miss Hassell.
THE COURT: John, do you know the difference in telling the truth and telling a lie?

THE WITNESS: Yes.
THE COURT: And what are you supposed to do? Which one are you supposed to do?
THE WITNESS: Tell the truth.
THE COURT: What happens if you don't tell the truth?
THE WITNESS: I will get in trouble.
THE COURT: This morning you are going to tell us the truth, is that correct?
THE WITNESS: Yes.
THE COURT: Because if you don't, you will get in trouble.
THE WITNESS: Yeah.
THE COURT: You may proceed.

DIRECT EXAMINATION
BY MS. GILL:

APPENDIX M

MS. DUVALL: Good morning.
Your Honor, the last comment that counsel makes that the Commonwealth does not have this, has not made a motion, rule 3-A.10 states that if you are doing a joinder of defendants, it's upon a motion of the Commonwealth. When you are doing a joinder of more than one offense, under C it says the Court may direct. I don't believe the Commonwealth needs to make a motion on that. Rule 3-A.10 states, of course, if justice does not require separate trials, we would contend that justice does not require separate trials.

This case that's before the Court involves three children. It involves the summer of 1995. The children were six, Cory's six, Christen is eight and Little John is six. These children were good friends, their mothers were friends. Cory and Christen are brother and sister and they spent most of their summer at Little John's home, and the defendant lived with the Guths, which is Little John's parents.

He would take care of these children and a younger child also. He would watch them while the mothers were at the store, inside watching television, and the acts occurred frequently over this time period, over the summer.

It wasn't a matter of Cory being molested once or Christen or John. This was something that went on a weekly basis. Most of the acts occurred in an abandoned house which was behind their home, with the exception of Little John, who having lived in the same home with the defendant was often abused there by himself. The children

were all together when these things happened, when a lot of these things happened.

In the preliminary hearing, only one child testified because he could testify

as to the molestation of the other child because he was there and he saw it. In fact, I believe each saw the other at different times. This was a recurring offense. The acts would each be admissible in the other trials.

This is what the Commonwealth would contend because it does show a common scheme and plan and does show intent. So if they're separated, these three children would be involved in all three trials, would have to testify in all three trials, and the jury would hear each child's molestation.

As far as dates and times that counsel wishes it, I would just proffer to the Court that this is an ongoing thing that happened over three months. These children at six and eight cannot put dates and times.